No. 12189

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACOB MORRIS DANZIGER,

Appellant,

vs.

ROBERT E. CLARK, United States Marshal, Southern District of California,

Appellee.

Appeal from the United States District Court for the Southern District of California Central Division

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APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Statement of the Case.

The case is here upon an appeal from an Order discharging a Writ of Habeas Corpus entered in the District Court of the United States for the Southern District of California, Central Division, as will appear from the transcript of the record on appeal (p. 37).

This Honorable Tribunal on the 23rd day of April, 1947, caused to be filed a decision in a case on appeal by Appellant herein, from a judgment rendered following a conviction of Appellant in a criminal proceedings had which is numbered in this Court 10,989, to which reference is hereby made.

At the time of the rendition of the decision rendered in said cause 10,989, the law appertaining to the legal

propriety of a part of the proceedings taken against Appellant herein, had not crystalized in that the all important decision in the case of *Ballard v. United States* originally reported in 152 F. 2d 941, had not come to the attention of Appellant herein in time to urge the grounds therein reflected, as voiding the trial under circumstances identical to those existing at the time of the return of the indictment as against Appellant, and it further became apparent that the learned justice, the author of the opinion rendered in action 10,989 was not mindful of *the actual grounds presented for a continuance* of the proceedings reviewed in said cause, as well as the facts that backgrounded and derrogated the *waiver* of trial by jury, all in disregard of the constitutional rights of Appellant in said cause secured to him in order that it might be held that he had had the kind and manner of trial required under the laws of the United States.

Some of these factors were presented to this Honorable Court in a petition for a rehearing, which was denied without comment. The Appellant herein thereupon petitioned the Supreme Court of the United States for a Writ of Certiorari, which Writ was not granted.

Following the denial of Certiorari Appellant discovered a statement made in the record by the trial judge, not known to Appellant at the time he was prosecuting his appeal or petition for Writ of Certiorari, to the effect that the trial judge had virtually proceeded in the cause formerly reviewed by this Court in action 10,989 on the theory that the defendant, to wit, the Appellant in this cause, had virtually entered a plea of guilty.

Appellant accordingly applied to the United States District Court for the Southern District of California, Central Division, for a Writ of Habeas Corpus, a copy

of the said petition appears in the transcript of record, which will hereafter be designated as Tr., at pages 2 to 10. On December 1, 1947, the Court directed the Writ to issue [*id.* pp. 12, 13]. Thereafter a return by Appellee to said writ was made which return in effect referred to the former proceedings had in this Court, cause No. 10,989. The petition for Certiorari to the Supreme Court thereafter, and the coming down of the mandate [*id.* pp. 14-15].

To this return the Appellant filed a traverse [*id.* pp. 18-26]. Pursuant to the issues raised by the traverse the writ was ordered discharged on the 8th day of July, 1948 [*id.* p. 37].

Appellant herein, following the order discharging the writ, filed his notice of appeal to this Honorable Court [*id.* p. 122].

Jurisdiction.

This Court has jurisdiction of the within appeal by reason of the provisos of 28 U. S. C. Section 1291 and Section 2253, as well as the memorandum filed in this cause on December 14, 1948, to the effect that "We hold that the appeal is not moot and that the parties may proceed in the prosecution of the appeal."

Statement of Facts

The entire record of the proceedings originally presented for review in this Honorable Court in the matter numbered 10,989 was presented in this habeas corpus proceeding to the trial court as well as all of the briefs. The trial court's attention in this habeas corpus hearing was called to the *true* affidavit for a continuance which was neither considered by this Court in the former pro-

ceeding or by counsel for the government until after the decision rendered. [See Tr. pp. 40, 56.]

For the first time then it was established of record, that Appellant was arrested by a United States Marshal in 1941, and that no arraignment of said Appellant had taken place until some three years subsequent [*id.* p. 110]. The remarks of the original trial judge to the effect that he had been proceeding on the assumption that a verdict of guilty had been entered, was lodged with the court below at the hearing on this writ. These remarks were made on the 4th day of March, 1945, and constitute (5) in the designation of the record [Tr. p. 129].

The trial court erroneously in the habeas corpus proceedings declared: "If such statement indicated error on the part of the Trial Judge during the trial, surely the petitioner waived it when he did not either include it as an assignment of error, or even bother to print it in the record on appeal, of which, incidentally, there were over 1800 printed pages. * * *" The court below was apparently overlooking the fact that these comments of the trial court were matters to which Appellant and his counsel were not previously privy. The record will show that neither were present nor informed of said observation in time to present them to the appellate Tribunal.

The memorandum Opinion of the Honorable Pierson Hall, the Judge who granted and subsequently discharged the writ of habeas corpus culminating in this appeal, has submitted a written Memorandum of Opinion which is of particular significance in the consideration of this appeal, which Opinion appears in Tr. pages 26-36. The

said trial court admits as per record [*id.* p. 42] that he would not have decided that the arraignment of the defendant was according to law but that he could not review on habeas corpus, former rulings. Said Court further admitted that there is no doubt that the challenge to the grand jury on the ground of exclusion of women was a valid challenge if not waived [*id.* p. 77].

The Court additionally stated as follows:

> "Whatever the boundaries are of the power of a District Court under the writ of habeas corpus (See Sunal v. Large, 332 U. S. 175, and its dissents, for a general discussion of the necessity of keeping such boundaries flexible) it cannot be said that there lies within such boundaries the power of a United States District Court to act as a reviewing court on a habeas corpus proceeding to both the Circuit Court of Appeals and the Supreme Court on matters and things previously considered and decided by such Appellate Courts on appeal in a specific case. And that is what the petitioner here asks, with a view to getting a different result, which amounts to a request for a reversal by the District Court of both the Circuit Court of Appeals and the Supreme Court."

ARGUMENT AND AUTHORITIES.

POINT I.

The Court Was in Error in Applying the Doctrine of Res Adjudicata. The Court Below Indicated Clearly That It Was Bound by the Previous Determination.

However, this is directly contrary to the law as established by the following noteworthy decisions:

Owen v. Johnston, 306 U. S. 19;
Hawk v. Olson, 326 U. S. 271;
Ex parte Mayfield, 141 U. S. 107;
Moore v. Dempsey, 67 L. Ed. 543;
Marmo v. Rayan, 92 L. Ed. 204.

The use of the Writ of Habeas Corpus is not restricted to cases where the judgment is void for want of jurisdiction but extends to all matters where the conviction is had in disregard of Constitutional rights of the parties in question. See *Whaley v. Johnson,* 86 L. Ed. 1303.

POINT II.

The Failure to Arraign the Appellant for a Period of Three Years After His Indictment Was Fatal Insofar as It Conferred Jurisdiction in the Court Below.

It is manifest and apparent that there has been confusion between the difference between arraigning a defendant, and, *after* his arraignment bringing him to trial.

In this case there was a failure to arraign which was a violation of 18 U. S. C. A. 595.

This process is fundamentally requisite before a trial may be deemed to be had as required by the laws of the United States. This Court has recognized that, in *Runnells v. United States,* 138 F. 2d 346; *U. S. v. Haupt,* 136 F. 2d 661; and cases therein cited. See *Crane v. U. S.,* 40 L. Ed. 1097; *Rodriguez v. U. S.,* 49 L. Ed. 994.

POINT III.

The Point Expressed by the Trial Court That Had Appellant's Counsel Stopped at a Particular Point in Raising His Objection in Respect to the Motion to Quash the Indictment, Is Without Merit.

The record reflects that the Court recognized the importance of the objection to jurisdiction interposed by Appellant, and states that the objection in the form in which it was couched by reason of an addenda nullified the form of the objection. It is respectfully submitted that this is not the policy of the law of the United States. The case of *Musser v. Utah,* 333 U. S. 95, repudiates this doctrine.

Furthermore, in the *Rodriguez* case, 49 L. Ed. 994, it was stated the objection to jurisdiction where the grand jury was improperly impaneled may be raised at any time. In this connection it may not be amiss to point to the case of *Zapp v. U. S.* reported in 91 L. Ed. 688. In this cause a second petition for rehearing in the Supreme Court was granted at which time the Court, apparently on its own motion, although not urged previously in the motion for dismissal of the indictment, based on the holding in the *Ballard* case, disposed of the cause.

Conclusion.

It is respectfully submitted that the record of the proceedings had in respect to the indictment and conviction of Appellant herein were had in violation of the now definitely established requirements under the Constitution of the United States. There was no arraignment as required by law; there was no opportunity afforded the Appellant to produce witnesses in his own behalf; he was coerced into waiving trial by jury; the trial judge, as now established by the record, was proceeding on a theory that a plea of *guilty* had been entered although the defendant had definitely pleaded not guilty; Appellant was indicted by a grand jury that was illegally constituted; his former appeal was decided on a misapprehension of the facts of record and in disregard of the existence of matters affecting the fundamentals of a fair trial; and finally the trial court below with this information, did accept the proceedings previously had, as being bound by the former rulings and finally, Appellant's contention in the court below was not that there was insufficient evidence to support his position, but that there was NO evidence and it thereupon became incumbent in the proceedings had on habeas corpus for the trial court to decide for himself whether there was ANY evidence.

For the reasons herein appearing it is respectfully submitted that the order discharging the writ of habeas corpus herein granted should be annulled and set aside with direction that the writ be granted and Appellant discharged on the grounds that his conviction was in violation of the fundamental law of the land.

Respectfully submitted,

A. BRIGHAM ROSE,

Attorney for Appellant.